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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

162

No. [redacted]

L. P. STEUART, INC., *Petitioner*,

v.

JOSEPH H. MATTHEWS, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on January 16, 1964. Petition for rehearing en banc was denied on March 9, 1964.

OPINIONS BELOW

The District Court's Amended Memorandum and Opinion is unreported but is reprinted at (R 7). The opinion of the Court of Appeals (Appendix A, p. 1a infra) is reported in 329 F. 2d 234 (1964).

JURISDICTION

The Opinion of the Court of Appeals was filed on January 16, 1964. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Should Clause (6), the so-called catch-all clause of Rule 60(b) of the Federal Rules of Civil Procedure be utilized to escape the plain language of Clause (1) of said Rule, providing that an application for relief from a judgment upon a showing of neglect must be made within one year from the date of the entry of judgment.

RULES INVOLVED

Rule 60(b)(1) and (6) of the Federal Rules of Civil Procedure.

Rule 13 of the Local Rules of the United States District Court for the District of Columbia.

STATEMENT OF THE CASE

Respondent, Joseph H. Matthews, filed an action in the United States District Court for the District of Columbia on February 5, 1960 for damages growing out of personal injuries against Petitioner, L. P. Steuart, Inc., and another party, one Thomas Jefferson Pate, claiming that an employee of Petitioner corporation did, on February 7, 1957, operate a car owned by the aforesaid Pate in a negligent manner, thereby causing injury to the Respondent. The plaintiff invoked jurisdiction in the court of first instance upon the ground that the amount in controversy exceeded Three Thousand Dollars ($3,000.00) exclusive of interest and costs. (R. 3). The additional party

defendant in the trial court, Pate, was never served with process, so that the action never went to issue against him. Because of this fact, the Clerk of the United States District Court on October 19, 1960 dismissed the Respondent's cause of action pursuant to Local Rule 13 of the Rules of the United States District Court for the District of Columbia for failure of the Respondent, plaintiff in that court, to take some affirmative action within the six month period provided for in Rule 13. The dismissal was therefore without prejudice for want of prosecution.

On October 22, 1962, over two years after the judgment of dismissal, Respondent, by new counsel, filed a motion to reinstate his cause of action pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. (R 5). In support of said motion, two affidavits were filed, one by the Respondent and a second by the attorney who represented the Respondent originally. (R 5, 6). Each of the affidavits set out facts and circumstances which clearly indicate neglect.

After opposition had been filed thereto by Petitioner, oral argument was had upon said motion to reinstate and it was granted. The District Court's Amended Memorandum and Order filed February 4, 1963 makes it abundantly clear that the trial court felt that plaintiff's original counsel was chargeable with a lack of due diligence but that the court was of the view that the consequences of his counsel's neglect should not be visited upon the Respondent and accordingly ordered reinstatement under Clause (6) of Rule 60 (b). (R 7).

Thereafter an appeal was noted to the United States Court of Appeals for the District of Columbia Circuit

by the Petitioner who urged upon that court that if the District Court found the neglect to be excusable, the provisions of Clause (1), which require that a motion for relief be filed within one year from the judgment of dismissal, barred reinstatement. If, on the other hand, the District Court found the neglect to be inexcusable, then by definition, reinstatement was inappropriate. Petitioner argued that the catch-all provisions of Clause (6) could not apply to a situation of neglect by counsel, whether that neglect was excusable or inexcusable.

The Court of Appeals in a 2-1 opinion affirmed the action of the District Court in granting reinstatement holding that "Clause (1) of Rule 60(b) is not and Clause (6) is broad enough to permit relief when, as in this case, personal problems of counsel caused him grossly to neglect a diligent client's case and mislead the client." In effect, the Court of Appeals held that Clause (6) is sufficiently broad to support reinstatement, even though such a holding clearly does violence to the well settled principle that a client is bound by the acts and omissions of his attorney.

Thereafter a timely motion for rehearing en banc was filed, which motion was denied by an order of the Court of Appeals dated March 9, 1964.

REASONS FOR GRANTING WRIT

1. BY HOLDING THAT THE INEXCUSABLE NEGLIGENCE OF RESPONDENT'S FORMER COUNSEL CONSTITUTED "EXCEPTIONAL CIRCUMSTANCES" NECESSARY TO OBTAIN RELIEF FROM JUDGMENT, THE COURT OF APPEALS RULED CONTRARY TC DECISIONS OF THIS COURT.

The decision of the court below is contrary to the decisions of this court in *Klapprott* v. *United States*, 335 U.S. 601 (1949) and in *Ackermann* v. *United States*, 340 U.S. 193, (1950). In *Klapprott*, *supra*, this Court held that the provisions of Clause (6) of Rule 60(b), only afforded a basis for relief from a judgment in the situation where the moving party could demonstrate to the court "extraordinary circumstances" to explain his failure to appeal and the delay in moving for relief from the judgment. In response to the Government's contention in that case that the petition showed nothing but "excusable neglect" this Court held that if the petition did nothing more than to demonstrate a situation of neglect, then the petitioner could not avail himself of Clause (6) since by the terms of Clause (1) of the Rule, there is a one year limitation upon applications for relief from a judgment based upon excusable neglect.

In *Ackermann*, *supra*, petitioners attempted to bring themselves within Clause (6) to explain their failure to appeal from a denaturalization order and their failure to move for relief from the judgment for over four years after it was entered. This Court in that case ruled that in order for petitioners to avail themselves of Clause (6), they had to demonstrate "exceptional circumstances" to explain their failure to act and that "inexcusable negligence" does not give rise to the exceptional circumstances necessary to bring Clause (6)

into play. In other words, this Court held that Clause (6) had no application to a litigant who was inexcusably negligent.

The Court of Appeals in the instant case found counsel's conduct to be inexcusable when it said in its opinion, "counsel's negligence was not excusable and the court by clear implication so found." (App. A, p. , infra). This decision is accordingly clearly in conflict with the holding of this Court in *Ackermann*.

It would make a shambles of Rule 60(b) if it were to mean, as the Court of Appeals held, that one who was guilty of excusable neglect may only obtain relief from judgment if he makes application therefor within one year from entry; whereas, one who can demonstrate that he or his counsel was guilty of gross or inexcusable neglect is subject to no such limitation.

2. THE RULE OF LAW UPON WHICH THE COURT OF APPEALS RESTS ITS DECISION IS CONTRARY TO THE HOLDING OF THIS COURT IN LINK v. WABASH RAILROAD CO., 370 U. S. 626 (1962).

Petitioner urges that this Writ should issue for it is quite clear that the decision of the Court of Appeals involves a real conflict in the application of a time honored principle of law, one whose implications and effects far outreaches the interest of the individual litigants herein. The holding of the Court of Appeals can only be read as authority for the proposition that a litigant is not bound by the acts or omissions of his attorney. This holding is clearly contrary to the recent decision of this Court in *Link* v. *Wabash Railroad Co.*, *supra*, in which this Court reaffirmed that under our system of law there is no question but that the acts of a litigant's freely chosen attorney are bind-

ing upon the litigant. The results reached in this case therefore touches not only upon the responsibilities of the members of the legal profession, but also upon the rights of our citizens who may some time become involved in litigation. Further, it is patently clear that the consequences of this decision will tend to frustrate rather than to promote the orderly administration of justice in the federal courts. The problem concerning the interpretation of Rule 60(b) is appropriate for review by this Court on certiorari. It is significant for the decision of the Court of Appeals is contrary to decisions of this Court and further the implications of this decision will well affect the efficient administration of justice in the federal courts.

CONCLUSION

The circumstances as disclosed by this record leading to the dismissal of this case, as well as the failure of Respondent to seek reinstatement for over two years constituted neglect. The Court of Appeals, by holding that inexcusable neglect of counsel constituted exceptional circumstances justifying relief under Clause (6) of Rule 60(b) is contrary to the decisions of this Court. Moreover, the rule of law absolving the client from the omissions of his retained counsel is contrary to the holdings in this Court.

For these reasons, Petitioner respectfully asks that this Court grant the writ of certiorari.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17504

L. P. STEUART, INC., *Appellant*,

v.

JOSEPH H. MATTHEWS, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

Decided January 16, 1964

Mr. Joseph S. McCarthy, with whom *Mr. Joseph P. Clancy* was on the brief, for appellant.

Mr. Joseph D. Bulman, with whom *Messrs. Sidney M. Goldstein, Arthur S. Feld* and *Roscoe A. Faretta* were on the brief, for appellee.

Before EDGERTON and PRETTYMAN, *Senior Circuit Judges*, and WILBUR K. MILLER, *Circuit Judge*.

EDGERTON, *Senior Circuit Judge*: Appellee Matthews was injured on February 7, 1957, by a car driven by an employee of appellant L. P. Steuart, Inc. On February 5,

1960, two days before the statute of limitations would have barred his claim, Matthews filed suit. On October 19, 1960, the complaint was dismissed without prejudice, after notice to his then counsel, for failure to prosecute. Two years later, on October 22, 1962, the plaintiff by new counsel moved to reinstate the suit. The District Court granted the motion and the defendant appeals.

In support of appellee's motion to reinstate, his former counsel made affidavit that he had been "beset with personal problems" which involved a serious illness of his wife and the recent deaths of his parents. Appellee made affidavit that he and others in his behalf made "numerous inquiries of" his former counsel who "refused to answer such inquiries" and assured appellee "from time to time" that "the case was proceeding and that settlement of it would be made 'soon'." There is no suggestion that there was any foundation for counsel's reassuring statements. In March, 1962, appellee learned, but only by personally checking with the Clerk of the District Court, that his case had been dismissed for failure to prosecute. His former counsel then told him "that steps would be taken to reinstate the case" but took no action, and again refused to answer inquiries.

Rule 60(b) of the FEDERAL RULES OF CIVIL PROCEDURE provides: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order or proceeding for . . . (1) mistake, inadvertence, surprise, or excusable neglect . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken."

Appellant says appellee's motion to reinstate was barred by the one-year time limit in clause (1) concerning excusable neglect. But the District Court did not act on

the theory of excusable neglect. On the contrary, it expressly applied the "'catch-all' rule" 60(b)(6). Counsel's neglect was not excusable and the court, by clear implication, so found. The judge said he felt "that in this particular case the client, plaintiff, a person unfamiliar with court procedures, should not be penalized by the action of his counsel, who admittedly did not attend to the matter when he received notice of the contemplated dismissal." On the part of Matthews himself there was no neglect. *Cf. United States* v. *Karahalias*, 205 F. 2d 331, on rehearing 334 (2d Cir. 1953). *Clause (1) of Rule 60(b) is not and clause (6)* is broad enough to permit relief when as in this case personal problems of counsel cause him grossly to neglect a diligent client's case and mislead the client. Clause (6) "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott* v. *United States*, 335 U.S. 601, 614-615 (1949). *In re Estate of Cromidas*, 14 F.R.D. 15 (D. Alaska 1953). In concluding that reinstatement was appropriate to accomplish justice in this case, the District Court did not abuse its discretion.

Affirmed.

WILBUR K. MILLER, *Circuit Judge*, dissenting: In this case the alleged tort occurred February 7, 1957, but the complaint was not filed until February 5, 1960, just as the three-year period of limitation was about to run. Then followed another period of inactivity on the part of appellee, because of which his complaint was dismissed October 19, 1960, as of the previous August 26. Appellee's counsel who had filed the suit admitted that he received notice of the dismissal, but appellee claims he had no personal knowledge of it until "on or about March, 1962." Even then he took no action until October 22, 1962, when through different counsel he filed the motion to reinstate with which we are now concerned. Purportedly acting

under Civil Rule 60(b),[1] the trial judge granted the motion to reinstate which was made more than two years after the suit was dismissed for want of prosecution.

The first question is one of timeliness: (a) if the motion was made and granted for "excusable neglect" as permitted by subsection (1) of the Rule, the motion was untimely and reinstatement pursuant to it was error, as such a motion may not be made more than one year after the entry of the order from which relief is sought; (b) on the other hand, if the motion was made and granted under subsection (6), that is, for any reason other than excusable neglect or some other ground listed in subsections (1), (2) and (3), the motion was not timely and reinstatement pursuant to it was error, because the motion was not made within a reasonable time after the entry of the dismissal from which relief was sought, as Rule 60(b) requires. I do not believe that a motion made more than two years later can be said to have been made within a reasonable time, when the circumstances of this case are considered. In fact, as this motion was not made until

[1] The pertinent portion of that Rule is as follows:

> "On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . ."

more than six months after the appellee admits that he personally learned of his counsel's inexcusable neglect, it seems clear to me that the motion was not made within a reasonable time thereafter.

To be sure, the trial judge said he was acting under subsection (6) but I suggest his recitation to that effect is not conclusive. Applying the wrong label to a package does not change the nature of its contents: for example, flour in a sack labelled "corn meal" is flour, nevertheless. So it is here. If the trial judge really acted under subsection (1) pursuant to a motion which was indubitably untimely under that subsection, he did not change that fact by saying he acted under subsection (6).

The order of dismissal was entered because of the "lack of due diligence on the part of the then counsel for plaintiff," as the trial judge found. This was, of course, neglect on the part of appellee's counsel,—the majority opinion characterizes it as gross neglect. The only question on the tardy motion to reinstate—laying aside for the moment the question of limitation—was whether the neglect was excusable and therefore a ground for relief under subsection (1). Obviously it was not, for lack of due diligence is inexcusable and the trial court did not hold otherwise. Certainly, gross neglect, as the majority call it, is inexcusable.

Apparently recognizing that the lack of due diligence on the part of appellee's counsel could not be called excusable neglect, the trial judge concluded that the inexcusable neglect of his counsel which caused the dismissal should not be charged against appellee himself; and held that in this instance, contrary to the general rule, the appellee was not bound by the action of his counsel. If that were true, the only possible result would be that the lack of due diligence which was inexcusable neglect on the part of counsel became excusable neglect on the part of

appellee himself. But that would not permit reinstatement under subsection (1) because the motion therefor was filed more than two years after dismissal.

The trial judge turned, therefore, to subsection (6) as a basis for granting reinstatement. He found the "other reason justifying relief" in his conclusion that the appellee should not be charged with the consequences of his counsel's inexcusable neglect, and in his further conclusion that therefore the appellee himself was not guilty of any neglect—excusable or inexcusable. In other words, he decided that the appellee was entitled to relief from the order of dismissal because he thought the appellee was not responsible for his counsel's inexcusable neglect. No "other reason justifying relief" was suggested, and none appears. It follows that there was no reason for acting under subsection (6) if the trial judge was mistaken in holding that the appellee could not be charged with his counsel's inexcusable neglect.

The trial judge conceded in his memorandum that

> "The law is quite clear that under the usual circumstances the party to an action is bound by the action of his counsel. This is clearly set forth by the Supreme Court as recently as 1962 in *Link* v. *Wabash Railroad Company* [370 U.S. 626]. . . ."

But, expressly relying on the dissenting opinion in the *Link* case, he said:

> "The Court feels that in this particular case the client, plaintiff, a person unfamiliar with court procedures, should not be penalized by the action of his counsel, who admittedly did not attend to the matter when he received notice of the contemplated dismissal."

The majority of the Supreme Court said, however, in the *Link* case, at pages 633-4:

> "There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' *Smith* v. *Ayer*, 101 U.S. 320, 326." (pp. 633-634)

This is, I think, a plain pronouncement that, in circumstances like those present here, a client is bound not only by the acts but also by the omissions of his employed attorney.

Thus, the *Link* case nullified our decision in *Barber* v. *Turberville*, 94 U.S. App. D.C. 335, 218 F. (2d) 34 (1954), where two of our judges took the opposite view. In effect, the Supreme Court adopted the view of the dissenting opinion in the *Barber* case in which Judge Prettyman said, at page 339:

> "The court is relieving defendant from the judgment against her principally on the ground that her counsel was negligent. I think the court should hold lawyers responsible for inexcusable neglect. If courts say that counsel for defendants can neglect without excuse their clients' business but no ill effects to the clients will be permitted to result from this negligence, complete chaos in judicial proceedings will surely result. The negligence of her lawyer may have damaged

> Mrs. Barber in the sum of $10,000. But, where damages, in the form of an award to a third party, are inflicted upon a business man, a doctor, or a hospital by the negligence of his or its duly authorized agent, the courts do not relieve the principal from such damages. If a patient secures a judgment against a doctor because of the negligence of the doctor's assistant, we do not relieve the doctor because the negligence was that of his employee. I see no reason why we should protect a person against a judgment against him resulting from the negligence of his duly authorized attorney. In all such cases the principal may have a right of action against his agent, but that is a different problem. Doctors are liable for malpractice; I see no reason why lawyers should not be."

This cogent statement by Judge Prettyman, lately adopted in substance by the Supreme Court, is a complete refutation of the position taken by the trial judge as the basis of his decision.

The appellee suggests in his brief that the appellant has not shown it will be prejudiced by the reinstatement. The probability of prejudice is self-evident. The alleged tort occurred February 7, 1957, and it is plain that appellant's witnesses may not be available for the trial now ordered, which cannot take place until 1964. That is one of the reasons for statutes of limitations in such cases. A plaintiff should have full opportunity to present his case, but he should not be allowed to "soldier" on the job as this appellee has done and obtain a trial after many years of delay caused by inexcusable neglect justly attributable to him.

For the reasons stated, I would reverse the order of reinstatement.

APPENDIX B

Text of Rules Involved

1. Federal Rules of Civil Procedure, Rule 60(b).

"*Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On Motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

2. Local Rules of the United States District Court for the District of Columbia, Rule 13.

"*Dismissal for Failure to Prosecute; Entry of Default for Failure to Proceed.*

(a) Clerk to Warn Dilatory Party; Dismissal Without Prejudice; Notice Of. If a party seeking affirmative relief fails for five months from the time action may

be taken, to comply with any law, rule or order requisite to the prosecution of his claim, or to avail of any right arising through a default or failure of an adverse party, or to file a Certificate of Readiness under Rule 11(d), within six months from the date the action is called on the call of the civil calendar, the clerk shall warn the dilatory party by mail that his claim will stand dismissed if he fails to comply with this rule, making a note in the docket of the mailing; and if the delinquency continues for six months the complaint, counter-claim, cross-claim or third party complaint of said party, as the case may be, shall stand dismissed without prejudice whereupon the clerk shall make entry of that fact and serve notice thereof by mail upon every party not in default for failure to appear, of which mailing he shall make an entry.

(b) *Failure to Warn; Effect.* A failure of the clerk to give the warning as above provided will not affect the running of the six months' period or otherwise relieve a party from operation of this rule.

APPENDIX C

Judgment Sought to be Reviewed

~~(Filed March 16, 1964)~~

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1963.

Civil 363-60

No. 17,504

L. P. STEUART, INC., *Appellant*,

v.

JOSEPH H. MATTHEWS, *Appellee*.

Appeal from the United States District Court for the District of Columbia.

Before: EDGERTON and PRETTYMAN, *Senior Circuit Judges*, and WILBUR K. MILLER, *Circuit Judge*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the Court that appellee herein recover from appellant his taxable costs on this appeal, and have execution therefor.

Per Senior Circuit Judge EDGERTON.

Dated: January 16, 1964.

Separate dissenting opinion by *Circuit Judge* WILBUR K. MILLER.

A true Copy,
Test: NATHAN J. PAULSON
Clerk of the United States Court of Appeals
for the District of Columbia Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1197

L. P. STEUART, INC., *Petitioner*

v.

JOSEPH H. MATTHEWS, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent respectfully submits that the petition for a writ of certiorari should be denied for the following reasons:

(1) The question presented by Petitioner is inappropriate for review by this Court as it would require this Court to again review the sound judicial discretion of the District Court which exercise of dis-

cretion has already been affirmed as proper by the Circuit Court of Appeals.

(2) The District Court's order, affirmed by the Circuit Court of Appeals, is interlocutory in nature and presents no extraordinary situation requiring review by this Court at this juncture in the procedure, there being no final judgment.

(3) The relevant cases to the issue presented in the instant case present no real conflict of decisions.

JURISDICTION

The motion to reinstate this cause of action was addressed to the sound judicial discretion of the District Court which, after hearing all arguments of counsel for both sides, reinstated the cause of action after finding that the respondent should not be penalized for the lack of diligence of his then counsel and that this particular case rested upon its own facts and that Rule 60 (b) (6) of the Federal Rules of Civil Procedure applied.

Ordinarily application by a District Court of the Rules of Civil Procedure when affirmed by the Circuit Court of Appeals will not be reviewed by this Court. This is particularly true when the question is one that concerns the judgment of the District Judge in relation to a particular set of facts. *Appalachian Power Company* v. *American Institute of Certified Public Accountants*, 361 U.S. 887, 80 S. Ct. 16, 4 L. Ed. (2nd) 30.

This Court in the exercise of its discretionary power of review upon writ of certiorari considers whether the instant case is one in which "there are special important reasons" for the granting of said writ as re-

quired by Supreme Court Rule 19. *Rice* v. *Sioux City Cemetery*, 349 U.S. 71, 73, 75 S. Ct. 614, 99 L. Ed. 897. The granting of the writ of certiorari will be denied except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties and in cases where there is a real an embarrassing conflict of opinion and authority between or among the Circuit Courts of Appeal. *Layne & Bowler Corp.* v. *Western Wellworks, Inc.*, 261 U.S. 387, 393, 42 S. Ct. 315, 66 L. Ed. 792.

The decision in this case presents no question of importance to persons other than to the particular litigants, and, the respondent respectfully submits that under the test laid down by Rule 19 of the Supreme Court rules, no reason exists for the granting of the petition for certiorari herein.

LACK OF FINALITY

The order entered by the District Court and affirmed by the Circuit Court of Appeals is manifestly non-final. It does not terminate the case but makes possible a hearing on the merits. It is an order which neither forecloses renewal nor prejudices renewal of herein Petitioner's point in issue once a final judgment has been rendered, after a trial on the merits. See *Cohen* v. *Beneficial Loan Company*, 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528.

This Court stated in *Cobbledick* v. *United States*, 309 U.S. 323, 324-25, 60 S. Ct. 540, 84 L. Ed. 783:

> "Finality is a condition of review and is a historic characteristic of appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right of any review at all".

In *American Construction Co. v. Jacksonville T. & K. W. R. Company*, 148 U.S. 372, 384, 13 S. Ct. 758, 37 L. Ed. 486, this Court stated:

> "This Court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals or appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause".

Petitioner has made no suggestion that denial of certiorari at this juncture would "practically defeat the right of any review at all" at a later date or that "extra-ordinary inconvenience and embarrassment in the conduct of the cause" would result. The fact that the interlocutory order of the District Court was reviewed by the Circuit Court of Appeals pursuant to the Interlocutory Appeals Act, 28 U.S.C., Section 1292 (b) gives the petition no greater weight. Nothing in that statute or its legislative history indicates any congressional mandate to the Court to depart from the usual rule respecting review of interlocutory orders. Where, as here, the interlocutory order turns solely upon the discretion of the District Court and raises no other issue of general importance no reason for granting the writ of certiorari is apparent.

THERE IS NO REAL CONFLICT OF DECISION

There is no real conflict between the decision of the lower court and the decisions of this Court in *Klapprott v. United States*, (1949), 335 U.S. 601, 69 S. Ct. 384, 93 L. Ed. 266; *Ackerman v. United States* (1950), 340 U.S. 193, 71 S. Ct. 209, 95 L. Ed. 207 and *Link v. Wabash Railroad Company* (1962), 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 734.

Petitioner in the instant case maintains that *Klapprott*, supra, holds that relief under Rule 60-(b) (6) of the Federal Rules of Civil Procedure can be afforded only when the movant can demonstrate to the Court "extra-ordinary circumstances". Respondent in the *Klapprott* case (who stands in the position analogous to Petitioner in the instant case) contended that Klapprott had shown at most, "excusable neglect" and that he could not avail himself of the broad "any other reason" clause of 60 (b) (6). To this contention this Court at Page 613, said:

> * * * "petitioner's allegations set up an extraordinary situation which cannot fairly or logically be classified as mere 'neglect' on his part."

Clearly, this Court did not hold that relief under 60 (b) (6) could be had only where there were "extraordinary circumstances." Indeed in the *Klapprott* case this Court aptly summarized the test for relief under 60 (b) (6) when at pages 614-15, it stated:

> "In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

Petitioner in the instant case also relies upon this Court's decision in *Ackerman*, supra, which is both consistent with this Court's holding in the *Klapprott* case, supra, and clearly distinguishable from the instant case. In *Ackerman*, the petitioner (who analogously stands in the position of respondent in the instant case) had been granted a trial on the merits which proceeding resulted in a finding adverse to him. Ackerman failed to note an appeal from the trial finding adverse to him. Ackerman eventually filed a

motion to set aside the adverse judgment under Rule 60 (b) (6). His motion was denied and the denial was affirmed. After granting him a hearing this Court in denying his petition for relief under 60 (b) (6) this Court stated on Page 200:

> "By no stretch of imagination can the voluntary, deliberate, free, untrammeled choice of petitioner not to appeal compare with the Klapprott situation.
>
> * * * Neither the circumstances of petitioner nor his excuse for not appealing is so extraordinary as to bring him within Klapprott *or* Rule 60 (b) (6)." Page 263. (Italics supplied)

It is made manifestly clear from the last above quoted excerpt from the *Ackerman* case, that while Ackerman did not present the "extraordinary circumstances" which are the foundation of the *Klapprott* holding, neither did he make out a persuasive case for relief under the "other reason" clause of 60 (b) (6). Those decisions therefore, are mutually consistent with each other. It is equally clear that the *Ackerman* holding is distinguishable from the instant case for in that case, Ackerman was given a trial on the merits, whereas Mr. Matthews of the instant case has never had his day in court and the instant petitioner, L. P. Steuart, Inc., seeks to deny him that day in court.

Petitioner in the instant case also relies upon the *Link* case, supra, as dispositive of the issue raised under Rule 60 (b) (6). Respondent in the instant case contends that the *Link* case is not in conflict with the order entered by the District Court and affirmed by the Circuit Court of Appeals in the instant case. Respondent, indeed, contends that the *Link* decision is inapposite to the issue raised by the petitioner herein as

Rule 60 (b) (6) was not reviewed by this Court in the *Link* case, supra. In *Link* there was a dismissal under Rule 41 (b) of the Federal Rules of Civil Procedure, followed by an appeal from that dismissal. No motion was made under Rule 60 (b) (6) and that rule was never before this Court in *Link*. In the *Link* case this Court reviewed whether or not there was an abuse of discretion on the part of the District Court or error on the part of the Circuit Court of Appeals in finding no abuse of discretion and therefore affirming the District Court. This Court on Page 632 stated:

> "The availability of a corrective remedy such as is provided by Federal Rule of Civil Procedure 60 (b)—which authorizes the reopening of cases in which final orders have been inadvisedly entered—renders the lack of notice of less consequence. Petitioner never sought to avail himself of the escape hatch provided by Rule 60 (b)." * * *
>
> "Nor need we consider whether the District Court would have been abusing its discretion had it rejected a motion under Rule 60 (b) * * * No such motion was ever made, so that there is nothing in the record before us to indicate that counsel's failure to attend the pretrial conference was other than deliberate or the product of neglect."

Respondent in the instant case (who analogously stands in the position of petitioner in the *Link* case, supra), did avail himself of the escape hatch provided by Rule 60 (b) (6) and the District Court in the exercise of its sound judicial discretion reinstated the cause of action. Upon appeal to the Circuit Court of Appeals, it concluded that the District Court did not abuse its discretion and that reinstatement was appropriate to accomplish justice.

It is respectfully submitted that the *Link* case, supra, bears no pertinency to the instant case.

CONCLUSION

No abuse of discretion by the District Court in this case has been demonstrated, and under the facts there presented, the Circuit Court of Appeals agreed. For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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